

**Northampton Center for Children and Families, Inc.
and District 65, United Automobile, Aerospace
and Agricultural Implement Workers of Amer-
ica, Petitioner. Case 1-RC-16915**

August 21, 1981

DECISION ON REVIEW AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On August 21, 1980, the Regional Director for Region 1 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found that it would effectuate the purposes of the National Labor Relations Act to assert jurisdiction over the Employer herein. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision, contending that the Regional Director erred in asserting jurisdiction over its operations in that, *inter alia*, the Employer is a political subdivision of the Commonwealth of Massachusetts and that, in addition, it does not possess sufficient control over its employees to enable it to engage in meaningful bargaining as required by *National Transportation Service, Inc.*, 240 NLRB 565 (1979).

By telegraphic order dated September 10, 1980, the Board granted the request for review with respect to whether the Employer is a political subdivision and whether it meets the *National Transportation* criteria for assertion of jurisdiction. Thereafter, both the Employer and the Petitioner filed briefs on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, including the briefs on review, and finds that the Employer is exempt from Board jurisdiction under Section 2(2) of the Act as a political subdivision of the Commonwealth of Massachusetts.¹

An employer is a political subdivision if it is either (1) created directly by the State so as to constitute a department or administrative arm of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *N.L.R.B. v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402

U.S. 600 (1971). The record demonstrates, and we find, that the Employer is exempt under the first part of this test.

The Employer is engaged in providing residential, educational, and foster care services to emotionally disturbed and learning disabled children. It was created in 1974² as a day treatment program which provided comprehensive mental health services for children at the Northampton State Hospital and was directed by Superintendent Mary Jackson of the Massachusetts Department of Mental Health, hereinafter DMH. Jackson had been hired the previous year by DMH to develop such a program as part of DMH's effort to deinstitutionalize disturbed children by moving them out of state hospitals and into less restrictive community programs. The Employer was administered through DMH and the Office For Children by a state advisory board, composed in part of various state officials.³

In 1975 the Employer incorporated as a private nonprofit corporation and subsequently the Internal Revenue Service granted it tax exempt status. However, no change occurred in the Employer's operation.

During the next 2 years, DMH narrowed the Employer's program to its present form, that of an adolescent residential center providing both residential and educational services for children aged 13 to 19, and a specialized foster home placement service for emotionally disturbed children. In 1977 the Employer moved to its present location in Northampton, Massachusetts, where it currently occupies six buildings on 10 acres of land. Its facilities include 3 residential buildings which house 21 adolescents, 2 school buildings which provide educational services for these and 9 additional children, and 1 administration building. All facilities are owned by the Commonwealth.

In 1978, the Employer activated its corporate structure in order to gain access to Federal funds not otherwise available. The former state advisory board and Superintendent Jackson became the initial board of directors and executive director, respectively, and all employees were given the option of either transferring to other state facilities or continuing in their employment as employees of the corporation. DMH and the Employer then entered into a comprehensive contract for the funding and operation of the residential facilities. The Employer also entered into funding agreements with the public school districts and other state and

¹ In view of our holding herein, we find it unnecessary to pass on the issue of whether under *National Transportation Services, Inc.*, *supra*, the Employer retains sufficient control over substantive terms and conditions of employment to engage in meaningful bargaining.

² Originally, the Employer was named Western Massachusetts Comprehensive Children's Center. Its name was changed to Northampton Center for Children and Families in 1979.

³ In 1977 the Office For Children left the program and DMH assumed total responsibility for the Employer's operation.

Federal agencies to cover the educational and foster care programs.

As established by the Employer's bylaws, adopted at or about this same time, the Employer's board of directors is self-perpetuating and, at the time of the hearing, was composed of approximately 13 members, none of whom it appears is a state employee or official. However, the Employer's contract with DMH specifies, as required by DMH, that the appointment of the executive director must be approved by the DMH regional services coordinator. Indeed, the current executive director, Carl Cutchins, hired in July 1979, was not only approved by this state official, but was also hired by a search committee composed in part of four state officials. DMH also requires, and the contract provides, that the Employer develop an individualized service plan for each child accepted into the residential program; meet all state licensing requirements; participate in the quality assurance process under the supervision of DMH; and submit to numerous review requirements. These review requirements concern such matters as program substance, progress of individual participants, financial oversight including state audit of records, and the monitoring by DMH of all the Employer's activities. The contract also establishes the number and description of job classifications as well as the appropriate staff/client ratio. In addition, only those children who reside in region I of DMH (western Massachusetts) are eligible to attend the Employer's residential program, and the Employer can accept only those children referred by DMH. If the Employer refuses to accept a referred child, an appeal may be taken to the DMH regional service administrator who makes the final decision. The contract further permits the Employer to use the state-owned buildings at Northampton rent free, and DMH pays the utilities and all repairs in excess of \$250. DMH also retains title to all equipment purchased by the Employer at a cost of more than \$100.

The Employer's contract with DMH also binds it to the terms of a consent decree entered into in 1978 by DMH as a result of a class action suit brought in Federal district court against DMH and other state officials by patients of the state mental hospital.⁴ This decree generally provides that DMH will establish a comprehensive system of less restrictive care for mentally disabled persons and sets forth requirements concerning salary levels, employee training, periodic review of programs and individuals' records, and other operating guidelines.

⁴ *Brewster v. Dukakis*, CA 76-4423-F, (D.C. Mass. Dec. 7, 1978).

Similar to requirements under the DMH contract, the State Department of Education establishes the number of students who can be admitted to the Employer's educational facility, and only children who are referred by the Department of Education can attend. The Employer is also subject to an annual review of its educational program requirements under State Department of Education regulations.

The Employer receives all of its funds from governmental sources. Its residential program is funded entirely by DMH, and for the contract year July 1, 1979, to June 30, 1980, these funds comprised approximately 60 percent of the Employer's total budget. Most of the remaining 40 percent came from the State Department of Education which provides funds for the Employer's educational program and from a Federal grant from the Department of Health, Education, and Welfare for the foster care program.⁵ Each grant specifies and limits the purposes for which the funds may be used, and thus funds from any one program may not be transferred into another program. The Employer has virtually no input in determining the maximum amount of money the State will provide under its contract with DMH. Its budget, prepared in accordance with the total appropriation, must be approved by DMH line by line. Salaries are determined by DMH based on state guidelines and in conformity with the *Brewster v. Dukakis* consent decree. The Employer cannot alter its use of funds midcontract, even though the total budget figure would remain the same, unless it amends its budget through a formal process involving DMH and the Massachusetts Rate Setting Commission. However, DMH does not allow savings in any line item to be used to raise salaries. If at the end of the fiscal year the Employer has not expended its total appropriation, the Rate Setting Commission may retroactively decrease the unit rate to equal the Employer's actual expenditures.

The Employer's proposed budget for its educational program must be approved by the Department of Education and the Rate Setting Commission. The funds for the program are determined by a rate established by the Commission and come from the school districts in which the students reside.

The contract also prohibits the Employer from charging tuition or fees from its clients. Although the Employer may accept private funds, Executive Director Cutchins testified that DMH has reserved the right to direct the use of any such funds. How-

⁵ The HEW grant was for 3 years at \$100,000 per year and, at the time of the hearing, was scheduled to expire at the end of October 1980.

ever, the record indicates that DMH has no objection to the Employer using outside funds to supplement salaries. In any event, the Employer does not solicit private funds and since its creation has received only \$50 in private donations.

The Employer's personnel policy manual is required by both DMH and the Department of Education. The Employer used the personnel policies of state agencies as guidelines in the initial preparation of its manual. In addition, DMH requires that all fringe benefits must be available to all employees; that the Employer establish a grievance procedure, maternity leave, and vacation provisions; that group life insurance be term insurance and may not exceed the employee's gross annual salary; and that group health insurance be contributed to by both the Employer and the employee. Although the Employer's executive director and board of directors have ultimate authority to resolve employee grievances, DMH has the responsibility to investigate complaints filed with the Department against the Employer. If the executive director and the DMH area director cannot resolve the issue, the matter may be appealed to the regional services administrator. The record indicates that, in several cases, complaints directed to DMH concerning the Employer's staff employees have led to DMH's termination of those employees.

In light of the above and the record as a whole, we find that the Employer is an agency of the Massachusetts Department of Mental Health and is thus exempt from the Board's jurisdiction as a political subdivision of the Commonwealth of Massachusetts.⁶ The Employer was created directly by

the Department of Mental Health, a component of the Commonwealth of Massachusetts. Virtually all of the Employer's funds come from governmental sources and the amount of and use of those funds is specified and controlled by governmental contracts and grants; the Employer cannot accept private tuition; the use of private donations is taken into consideration by DMH, and, in any event, such donations are negligible; and any excess funds revert to the State. Moreover, job classifications, salaries, staff/client ratio, and licensing are specified by contract with DMH, and the Employer is subject to extensive review by DMH and the State Department of Education. In addition, DMH investigates complaints filed against the Employer's employees and has terminated such employees. DMH also requires that the Employer provide certain fringe benefits and determines the kind and scope of other benefits. The Employer's executive director must be approved by DMH; the Employer uses state-owned buildings rent free and title to all major equipment purchased by the Employer vests in DMH. DMH and the State Department of Education select which children can attend the Employer's facilities and only state residents are eligible. Finally, the Employer is bound to the terms of the *Brewster v. Dukakis* consent decree. It is clear from the foregoing that, in spite of its separate incorporation in 1975 and the use of its corporate structure in 1978 to qualify for Federal funds, the Employer is for all intents and purposes an arm of the Commonwealth of Massachusetts and is therefore exempt from Board jurisdiction under Section 2(2) of the Act.

As we have concluded that the Employer is exempt from coverage of the Act, we shall dismiss the instant petition.

ORDER

It is hereby ordered that the petition filed herein be dismissed.

⁶ See *Association for the Developmentally Disabled*, 231 NLRB 784 (1977); *Madison County Mental Health Center, Inc.*, 253 NLRB 258 (1980); *The New York Institute for the Education of the Blind*, 254 NLRB 664 (1981). *Truman Medical Center, Incorporated*, 239 NLRB 1067 (1978), relied on by the Petitioner, is distinguishable. In that case the center not only contracted with the city department of health from which it was incorporated but also had separate contracts with the county for the operation of a number of other facilities. There is also no evidence in *Truman* that the center is entirely funded by government sources; that the city/county exercises any control over employment relations (except that benefits must be at least equal to those provided government em-

ployees); or that the city/county determines who, and in what circumstances, can use the facilities operated by the center.